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JUN 8 1960
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 991

EDWARD F. QUIRKE,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. _____.

EDWARD F. QUIRKE,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

The petition of Edward F. Quirke for writ of certiorari respectfully shows:

1. That petitioner is seeking a writ of certiorari directed to the United States Court of Appeals for the Eighth Circuit to review the final action of said court in affirming the judgment of the United States District Court for the Eastern District of Missouri, by a decision rendered on the 4th day of May, 1960.

2. Petitioner, namely, Edward F. Quirke, filed the original proceedings, Numbers 16,310 and 16,311, in the

United States District Court for the Eastern District of Missouri on March 28, 1958, and subsequently, cases Numbers 16,312, 16,313, and 16,314 were filed in other District Courts of the United States, which suits were companion suits to the main case in question, and which suits were consolidated for trial by appropriate orders of the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit.

3. Petitioner shows that one of said suits in the lower Court was No. 58 C 157, which was an action brought by Edward F. Quirke on behalf of the bondholders of St. Louis-San Francisco Railway Company, and case No. 58 C 158 was filed in the lower Court by Edward F. Quirke as a stockholders derivative suit on behalf of the stockholders of St. Louis-San Francisco Railway Company.

4. The stockholders' derivative suit, brought by petitioner, a resident of Brooklyn, New York, alleged he was the owner of shares of common and preferred stock at the time that the action originated. He alleged that the suit was not a collusive one and the reason he did not attempt to obtain relief from the directors or other stockholders of the defendant corporation was because it would have been futile under the facts of the case. He alleged that the Board of Directors of Frisco has been dominating control of the corporation for many years prior to 1955, and that such Board and officials participated in and approved the illegal and wrongful acts set out in the petition and there had been a scheme and conspiracy on the part of the President and other officials of the defendant company and its directors to violate the provisions of the Transportation Act, Title 49, U.S.C.A., Sec. 5 (4), and to misuse the funds of the defendant railroad in furtherance of this scheme for empire building. That when the

treasury of Frisco had become too depleted, the officers with the necessary authorization of the Directors fraudulently filed on behalf of the corporation an application with the I.C.C. under Title 49, U.S.C.A., Sec. 20a, for authority to borrow funds by way of the sale of 19½ million dollars of First Mortgage 4% Series B Bonds representing that the funds were to be used for certain specific purposes, when in truth they knew that the proceeds of the sale would not be used for said purpose, but would be used in part to replenish the treasury which had been depleted through the unlawful acquisition of the Central of Georgia stock and partly to continue the unlawful purchase of said stock.

5. In the bondholders' suit Quirke alleged that the mortgage res had been diluted by the issuance of 19½ million dollars of First Mortgage Series B Bonds, *pari passu*, with the Series A Bonds, for an unlawful and illegal purpose and as a result, his holdings of the company has been affected and he has been damaged and injured.

6. The suit contended that Quirke had the right to bring the stockholders' derivative suit without the necessity of doing a useless and futile thing and the law does not require a person to do those acts which are impossible, and where the persons who would ordinarily be the ones to bring such an action are themselves parties to a fraud, they could not be expected to honestly and fairly represent the interests of the stockholders. In the bondholders' suit petitioner contended that the provisions of the Mortgage Indenture, Sec. 21, requiring that the trustee should be called upon to act in cases of default in bonds, etc., has no application to this case as this is not a case in which there is an action with reference to default in bonds, etc.

7. The two main suits are interwoven, in that, the application of the I.C.C. for permission to market and sell

19½ million dollars worth of mortgage bonds were part of the scheme or conspiracy or plan to acquire unlawful control of Central of George in violation of Sec. 5 (4), and that when this application was made, the officials of Frisco knew that the application was being made fraudulently for the purpose of enabling them to complete the transaction which had been in consummation for more than a year.

8. Petitioner is attaching herewith as an appendix to said petition for writ of certiorari the official record in the United States District Court for the Eastern District of Missouri, as aforesaid, and the United States Court of Appeals for the Eighth Circuit, the truth and verity of said records being certified by the Clerk of the United States Court of Appeals.

9. The judgment of the United States District Court was rendered by The Honorable Roy W. Harper, on May 7, 1959, sustaining respondents' motion to dismiss with respect to said five suits as consolidated, and the cases were ordered dismissed for the reasons set forth therein. Petitioner shows that within the time prescribed by law necessary notice of appeal was given, the record perfected for appeal, brief filed and argued in the United States Court of Appeals, and a decision was rendered by the United States Court of Appeals, affirming the action of the lower Court on May 4, 1960. That in the appendix to the petition, petitioner is also setting forth a supplement to the record filed by the respondents, including the opinion and judgment of the United States District Court in the United States Court of Appeals, so that this Court will be afforded the entire record of both sides of the controversy, including the finding of the Court.

10. Petitioner shows that no motion for a rehearing was filed because it was a unanimous action of the lower

Court, and the petitioner felt that the questions involved were ones directed primarily to this Honorable Court; however, the judgment of affirmation of the United States Court of Appeals as aforesaid was stayed to allow filing of this petition for writ of certiorari.

11. The grounds on which this petition for certiorari is being filed are:

(a) That both the District Court and Court of Appeals erred in dismissing the petitions of plaintiff because of the reasons set forth in said opinion.

(b) Because under the facts in said case it would have been a futile and senseless procedure for the petitioner to have been compelled to seek administrative relief within the internal structure of the defendant railway company when the management and control of said company was in the hands of the wrongdoers, against whom relief would have been sought.

Rule 23 (b), Federal Rules Civil Procedure.
Alben v. *Merchants Exchange*, 45 Mo. App. 206.
Bulkley v. *Big Muddy Iron Co.*, 77 Mo. 105.
Slattery v. *Trans. Co.*, 91 Mo. 217, 4 S.W. 79.
Kirraine v. *Boone*, 66 S.W.2d 861.
Dorrah v. *Pemiscot Bank*, 256 S.W. 560.

(c) That it would have been futile and useless to have petitioned for relief within the internal structure of said railway corporation for the reason that the officials and directors of said defendant corporation having been guilty of a positive, wrongful and continuous cause of action were not impartial officials who could have been expected to bring an action to recover from the wrongdoers, who would have been themselves.

Lucking v. *Delano*, 117 F.2d 159.
Isaac v. *Milton*, 33 F. Supp. 732.

Abraham v. *Parkins*, 36 F. Supp. 238.
Craftsman Finance Co. v. *Brown*, 64 F. Supp. 168.
Dederic v. *North American Co.*, 2 F.R.D. 353.

(d) That under the facts and circumstances petitioner had the right to bring the derivative stockholders suit to recover for the stockholders damages for the willful, continuous and wrongful acts on the part of the officials of said railroad and including the railroad itself.

(e) That to have required the petitioner to pursue the course suggested by the lower Court would have been equivalent to putting said case in moth balls, and assuming that the petitioner had followed said remedy, with the officials being in complete control the stockholders and directors would have been completely adverse to bringing said action, and any right of the plaintiff to bring such action would have been forever precluded and cut off and the Court erred in so holding.

Chicago Hansom Cab Co. v. *Yerkes*, 141 Ill. 320, 30 N.E. 667.
13 Am. Jur., p. 461.
Fletcher. Cyc. Corp., Vol. 13, Sec. 5963.
Cont. Sec. v. *Belmont*, 99 N.E. 138 (N.Y.).
Ballantine on Corporations, Sec. 146, p. 346.

"An application to the shareholders and the calling of a shareholders meeting seems an exceedingly unreasonable requirement. It erects a needless barrier to legitimate shareholders' suits which are expensive and burdensome at best."
Mayer v. *Adams et al.*, 141 A.2d 458.
Ibid.

(f) That there has been no violation of the terms of the bond indenture and under the facts of said bondholders case this was an action outside of the bond indenture and not within the bond indenture, and the lower

Courts erred in holding that as a condition precedent to bring said action, petitioner should have given bond and served notice upon the trustees to bring said proceeding to enforce the provisions of the bond indenture.

"While generally reasonable restrictions on the right to sue are valid and enforceable, they are to be strictly construed and their construction and application depends largely upon the exact language of the particular restrictions."

Fla. Natl. Bank v. *Jefferson Standard Life Ins. Co.*, 167 So. 378, 108 A.L.R. 77,

"Where there is fraud, etc., suits by individual bondholders without complying with these restrictions have been sustained."

108 A.L.R. 130.

13 Am. Jur. 864.

"Since restrictions on the right of a bondholder to sue are in derogation of a common law, right or remedy, they are strictly construed and may not be extended by implication, and they are effective only so far as they are clear and reasonably free from doubt. So, the common law right of an individual bondholder to sue on the bond is not affected by provisions of the mortgage or trust indenture given as security if such provisions do not exclude the right in express terms or by necessary implication."

19 C.J.S., Sec. 1163, p. 769.

"A bondholder may always sue to prevent the impairment of his security, without reference whatever to the maturity of the bonds or non-payment of interest."

19 C.J.S., Sec. 1192.

"As a general rule and in the absence of a prohibitory statute or an express stipulation to the contrary, an individual holder may maintain an independent action at law on a corporate bond or coupon if it is not paid at its maturity, even though it is secured by a

mortgage or trust deed containing general provisions for a mode of collection or foreclosure in case of default."

13 Am. Jur., Pars. 863-864.

(g) That the action of both of the lower Courts in questioning the right of Mr. Quirke to bring such an action and the opinion that Mr. Quirke had conflicting interests and could not bring such an action was contrary to the facts, because all that the facts showed was that Quirke happened to own stock in both railroads and is seeking to proceed against both in separate actions and was not contrary to the best interests of the railroad, but actually for the best interest of the railroad involved, and the action of the Court in so holding was contrary to the law and the facts.

(h) That the decision of the lower Court and Court of Appeals in holding that Mr. Quirke did not exercise his obligations to proceed within the internal structure of this railroad was contrary to the decision of this very Court itself.

Smith v. *Sparling*, 354 U.S. 91, 1 L. Ed. 2d 1205.

Ibid.

Ashwander v. *Tenn. Valley Authority*, 297 U.S. 288, 80 L. Ed. 688.

Ibid.

Price v. *Gurney*, 324 U.S. 100, 65 S. Ct. 513.

Ibid.

United Copper Sumter Co. v. *Amalgamated Copper*, 244 U.S. 261.

Ibid.

(i) The decision of the United States Circuit Court of Appeals, on page 6 of the opinion, that, "The plaintiff admits that another stockholder of the Central of Georgia is sharing with him the expenses of both his actions (suits

against Frisco and against Central of Georgia)," is unfounded and has no facts on which said statement should have been made. In the argument before the Court, counsel for Frisco made this charge, which was denied by counsel for Mr. Quirke, and which charge was untrue. In some unaccountable manner the Court wove into the record a purported fact which does not exist and which undoubtedly influenced it in the decision it reached.

(j) That paragraph 16 of Counts One and Two of the bondholders petition shows that petitioner owned bonds in Frisco, which he surrendered for the present bonds under the reorganization plan, and has the individual right to the protection thereof, and his right is not for foreclosure, receiver, or other remedy thereunder, as set out in section 21 of the indenture (opinion of the Court on page 8), but an action to prevent the unlawful use and distribution of the proceeds realized from the sale of the bonds and not for relief under the trust indenture, and the Court erred in failing to make this legal distinction.

The rule of *ejusdem generis* is applicable to the language used in the bond indenture behind which Frisco seeks to take refuge.

> "The doctrine of 'ejusdem generis' is that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as these specifically enumerated."
>
> *Children's Bootery* v. *Sutker*, 107 So. 345 (Fla.)
> *Gladys City Oil* v. *Right of Way Oil Co.*, 137 S.W. 171 (Tex.).
> *Brown* v. *J. H. Bell Co.*, 133 N.W. 231 (Iowa).
> *Rice* v. *Rinaldo*, 95 N.E.2d 30 (Ohio).
> *Steinfield* v. *Jefferson County*, 229 S.W.2d 319.

City of Phoenix v. *Yates*, 208 P.2d 1147 (Ariz.).
In re Grainger's Estate, 38 N.W.2d 435 (Neb.).
Hammett v. *Kansas City*, 173 S.W.2d 70 (Mo.).
Ibid.
McClaren v. *C. S. Robins & Co.*, 162 S.W.2d 856 (Mo.).
Beavers v. *LeSueur*, 3 S.E.2d 667.
In re Ratliff's Estate, 188 So. 128 (Fla.).
People v. *Silver*, Cal App., 102 P.2d 763.
McCollum v. *Price*, 211 S.W.2d 895 (Ark.).
Quick v. *Owens*, 15 S.E.2d 837 (S.C.).
Noble v. *Kisker*, 183 So. 836 (Fla.).

Article 9, Section 21 of the bond indenture prohibits filing of any suit by a bondholder. This Article applies only where it is an action for the foreclosure of an indenture, or for the execution of any trust hereunder, including the appointment of a receiver, or for any other remedy hereunder, which words of limitation are governed by the rule of "*ejusdem generis*" and only apply in cases such as foreclosures or some violation of the trust itself.

(k) The Court erred in placing petitioner as a stockholder, namely an owner, and petitioner as a bondholder, namely a creditor, on the same footing, when in truth and in fact the position in the one is unrelated to the other, except that by coincidence he is in both but separate categories.

12. The facts in this case show that the defendant railroad which operates in the central part of the United States has a board of stockholders and directors, and that these officials have been in control of the affairs of said railroad, with few exceptions, since May, 1955.

That as far back as 1952 Frisco commenced acquiring stock in the Central of Georgia Railway Company sur-

reptitiously, and by November, 1955, it had acquired half of the common and preferred stock of Central of Georgia, and continued to acquire such stock until by April 12, 1956, it actually owned more than 50 per cent of the stock and had infiltrated the Board of Directors of Central of Georgia itself.

13. A complaint having been made to the Interstate Commerce Commission, investigations were ordered, and subsequently the Examiner, Division 4, and the Interstate Commerce Commission itself found that Frisco had unlawfully, willfully and continuously, in violation of section 5(4) of the Transportation Act, acquired and effectuated control of Central of Georgia, and said railroad was ordered to divest itself of said holdings.

14. That because of the continuous and unlawful acquisition of said stock, criminal proceedings were recommended to the United States Attorney in St. Louis, and subsequently such proceedings were brought.

15. Petitioner shows that said railroad corporation entered a plea of *nolo contendere*, and was fined $5,000.00, which it paid, and its appeal from the action of the Interstate Commerce Commission ordering divestiture was dismissed as part of the plea of *nolo contendere* and as part of the judgment of that Court.

16. While these proceedings were before the Interstate Commerce Commission, petitioner brought his stockholders derivative suit and his bondholders suit and set out that Frisco, in addition to its unlawful acquisition of stock of Central of Georgia had fraudulently filed an application with the Interstate Commerce Commission, and had received permission to float $19,500,000 worth of bonds on the pretext that this money would be used for certain specific purposes, when in truth and in fact the moneys

were used to replace moneys taken from the treasury, due to the purchase of Central of Georgia stock, and for the additional purchase of Central of Georgia stock, and this was a fraud that was entered into by the officials and directors of Frisco and Central of Georgia, and petitioner asks that the stock acquired from the unlawful use of this money be impounded and held in Court for the protection of the bondholders.

17. The respondents filed motions to dismiss on two principal grounds: As to the stockholders suit, (1) that Quirke was not a disinterested party who should have brought the action, and (2) that he should have first sought relief from the officials, stockholders and directors of Frisco before going into Court; and as to the bondholders suit (3) that he had not complied with the provisions of Section 21 of the bond indenture.

18. Petitioner shows that the merits of said complaint have never been determined, and said case has been dismissed on highly technical grounds because of said alleged violations.

19. Petitioner shows that his dereliction is technical, if any, while the derelictions of the defendant are substantial and said right of recovery will be forever buried in the legal morass if said transaction cannot be aired out in the light of law and justice.

20. Petitioner shows that the case is one of such imperative public importance as to justify the taking of jurisdiction in the premises by the Supreme Court of the United States. The cases involved are of national importance, and the amounts involved are several million dollars. That said application is being made to ask the Court to require the trial of said case on its merits and that the decisions in *Price* v. *Gurney*, 324 U.S. 100, 65 S.

Ct. 513; *Koster* v. *Lumberman's Mutual Co.*, 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067; *Hawes* v. *Oakland*, 104 U.S. 450; *Motor Terminals, Inc.*, v. *National Car Co.*, 92 F. Supp. 155; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 80 L. Ed. 688; *Raterman* v. *Mo. Portland Cement*, 145 S.W.2d 422; *Vogeler* v. *Punch*, 103 S.W.1001; *Mayer* v. *Adams*, 141 A.2d 458; *Berkowitz* v. *Humphrey*, 163 F. Supp. 78; *United Copper Sumter Co.* v. *Amalgamated Copper*, 244 U.S. 261; and *Smith* v. *Sperling*, 354 U.S. 91; be applied.

21. That on the right of an individual bondholder suit, that the rule set forth and the doctrine of *ejusdem generis* be applied, as enunciated in *Phillips* v. *Houston National Bank*, 108 F.2d 934; *Hammett* v. *Kansas City*, 173 S.W.2d 70 (Missouri); and *Miller* v. *Corwallis*, 185 P.2d 540; and as laid down in 19 C.J.S., Section 1163-1192. The charge that Quirke is not a representative suitor is covered by the decision of *Dresdner* v. *Goldman Sachs*, 269 N.Y.S. 360.

22. Petitioner shows that under Rule 23(B) of the Federal Rules of Civil Procedure, which is similar to the rules of procedure in the State of Missouri, it specifically provides that the petitioner who was a stockholder at the time of the transaction which he complains of is not required to bring his action first within the corporate structure if the complainant shows reasons for his failure for not making such effort. Petitioner contends that the petition definitely and positively sets out ample reasons why under the facts in said case to be required to proceed against the corporation through its elected officials and stockholders would be to deny to petitioner relief in the premises. No motion to amplify was ever made by respondents.

23. Petitioner avers that this court has jurisdiction and that all constitutional issues have been properly preserved and presented for consideration, and that the record is full and complete and presented to the Court for determination.

24. Petitioner shows that the decision of the Court of Appeals for the Eighth Circuit is a final decision and, if sustained or if certiorari is denied, the issues will be forever determined and decided.

25. Petitioner further shows that this case presents issues which, when decided, will have a far-reaching and salutary effect on corporate management and ethics throughout the length and breadth of this country, and will point out the limits to which officials and directors of a corporation may go in dealing with the rights of minority stockholders.

26. Petitioner shows that under the Constitution of the United States, Article III, Section 2, the judicial power shall extend to all cases, in law and equity, arising under the Constitution, laws of the United States, and treaties made under their authority * * * to all controversies between citizens of different states; and under the Rules of the Supreme Court, where the amount involved was then in excess of $3,000.00; that the Court, therefore, had jurisdiction under the allegations and facts in said case.

The sections of the law granting to the Supreme Court jurisdiction are to be found in Title 28, Chapter 2101, of the U. S. Code Annotated. See Title 28, Section 2106, of the U. S. Code Annotated; *State of Minnesota* v. *National Tea Co.*, 60 S. Ct. 676, 309 U.S. 551; *Tinder* v. *U. S.*, 73 S. Ct. 911, 345 U.S. 565; and *Honeyman* v. *Hanan*, 57 S. Ct. 350, 300 U.S. 14.

Said Court has jurisdiction for the further reason that the United States Court of Appeals for the Eighth Judicial Circuit has rendered its decision in conflict with the decisions of this Honorable Court itself, as set out herein, and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The questions raised herein are of national importance, and a decision by this Court would reconcile the confusing and conflicting decisions of the many State Supreme Courts, Federal District Courts, and Courts of Appeals on the questions raised in said application.

Said Court has jurisdiction for the further reason that the question involved in one of the suits, namely the stockholders derivative suit, is the construction of Federal Rules of Procedure. Section 231(b), which Rules were adopted and formulated under and by authority of The Supreme Court of the United States.

27. Petitioner sets out further, as an appendix to this petition, the records certified to by the Clerk of the United States Court of Appeals.

Wherefore Petitioner Prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the decision of the United States District Court for the Eastern District, had in cases numbered 16,310, 16,311, 16,312, 16,313, and 16,314, consolidated, being Edward F. Quirke, appellant, versus St. Louis-San Francisco Railway Company *et al.*, appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment of said United

States Court of Appeals for the Eighth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Aaron Kravitch,

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Post Office Box 593,
Savannah, Georgia,

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St. Louis, Missouri,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, AARON KRAVITCH, being of counsel for the petitioner, do hereby certify that I have this day caused a copy of the petition, notice of the filing of the petition, and copy of certified record to be served on counsel for the respondents within ten days after the filing.

This 7 day of June, 1960.

Aaron Kravitch,

Of Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD F. QUIRKE,
Plaintiff in Certiorari,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL.,
Defendants in Certiorari.

NOTICE.

TO:

In compliance with Rule 38 of the Supreme Court of the United States, please take notice that we are filing in the Supreme Court of the United States a petition for writ of certiorari, together with a certified transcript of the record.

This 7 day of June, 1960.

Aaron McCormick

Of Counsel for Plaintiff in Certiorari.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,310
Edward F. Quirke, Appellant,
v.
St. Louis-San Francisco Railway Company, Daniel K. Catlin et al., Appellees.

No. 16,311
Edward F. Quirke, Appellant,
v.
St. Louis-San Francisco Railway Company, Daniel K. Catlin et al., Appellees.

No. 16,312
Edward F. Quirke, Appellant,
v.
St. Louis-San Francisco Railway Company, and David Roberts, Jr., Appellees.

No. 16,313
Edward F. Quirke, Appellant,
v.
St. Louis-San Francisco Railway Company, and E. L. Bruce, Jr., Appellees

No. 16,314
Edward F. Quirke, Appellant,
v.
St. Louis-San Francisco Railway Company, Hugh L. Harrell and R. Otis McClintock, Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

[May 4, 1960.]

Before GARDNER, WOODROUGH, and BLACKMUN, Circuit Judges.

GARDNER, Circuit Judge.

There are involved in this appeal five actions consolidated for the purpose of trial and likewise consolidated on appeal. Basically they all stem from the same transaction; to-wit, the purchase of stock in the Central of Georgia Railway Company by the St. Louis-San Francisco Railway Company, and represent two causes of action. The

first is a stockholder's derivative action brought by appellant on behalf of the St. Louis-San Francisco Railway Company, hereinafter referred to as the Frisco, against its directors and certain of its officers. The second is a bondholder's action, the bondholders reportedly represented by appellant, against the same directors and officers. Hereinafter we shall refer to appellant as plaintiff and appellee as defendant or the Frisco.

Defendant moved to dismiss both actions. Its motion to dismiss the stockholder's action is based upon the grounds that: (1) plaintiff's interests are adverse to those of Frisco and its other stockholders and that, therefore, he does not represent them; (2) the court lacks jurisdiction over the subject matter because the issues are within the exclusive primary jurisdiction of the Interstate Commerce Commission, and the proceedings before the Commission have not been concluded; and (3) the complaint fails to show plaintiff's efforts to secure shareholder action as required by Rule 23 (b) of the Federal Rules of Civil Procedure.

Its motion to dismiss the bondholder's action is based upon the grounds that: (1) the complaint fails to state a claim for fraud because the allegedly fraudulent representations were not made to plaintiff and plaintiff acquired his bonds before those representations were made; (2) the notice, demand and offer of indemnity requirements of the mortgage indentures, which are a condition precedent to the bringing of this action, have not been satisfied; (3) this is not a proper class suit because plaintiff does not adequately represent the interests of the class; (4) the requisite jurisdictional amount has not been established; and (5) the Interstate Commerce Commission has exclusive primary jurisdiction and plaintiff's administrative remedy has not been exhausted.

The court sustained both motions and this appeal followed. In seeking reversal plaintiff contends that the court erred in dismissing the stockholder's suit for failure to allege that plaintiff had sought relief from Frisco's stockholders. Likewise plaintiff contends that the court erred in dismissing the bondholder's suit for failure to allege compliance with the conditions precedent to suit imposed by the indentures which govern plaintiff's rights under his bonds, and that the court erred as to both causes of action in holding that plaintiff could not maintain these actions because he brought both actions in furtherance of interests adverse to those of Frisco and its stockholders and bondholders and therefore lacks standing to sue on their behalf and does not come into court with clean hands.

Plaintiff at all times here pertinent was the owner of 100 shares preferred and 200 shares of common stock of the Frisco. In his complaint he charges that as a part of the plan of reorganization of Frisco certain bond issues were authorized to be issued and sold for certain specific purposes; that the officers and directors of Frisco, in disregard of the authorization for the issuance and sale of the bonds, devoted a large part of the proceeds of the bond sale to the purchase of Central of Georgia preferred and common stock. He asks that Frisco be restrained from disposing of the Central of Georgia stock and requests that it be sequestered, seized and impounded by the court and that a trustee be appointed to take possession of that stock. He also seeks compensatory, punitive, and exemplary damages, plus expenses of the litigation, including counsel fees.

The complaint contains no allegations that prior to the institution of his stockholder's suit he had exhausted his remedies within the corporation by seeking remedy from

either the directors or stockholders. By amendment he charges that such action on his part would have been futile because the directors were hostile and had themselves committed the alleged wrong from which he sought relief, and that the stockholders were numerous and widely scattered and that it would be expensive, time-consuming, and impossible to reach them.

Section 23 (b) Federal Rules of Civil Procedure, Title 28, United States Code, provides in effect that as a condition precedent to the bringing of a stockholder's derivative action his complaint must allege "* * * the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders, such action as he desires, and the reasons for his failure to obtain such relief or the reasons for not making such efforts." We think the allegations with reference to his failure to obtain relief within the corporation quite inadequate. *Heintz* v. *National Bank of Commerce*, 8 Cir., 237 Fed. 942; *Stone* v. *Holly Hill Products*, 5 Cir., 56 F.2d 552; *Haffer* v. *Voit*, 6 Cir., 219 F.2d 704. In *Heinz* v. *National Bank of Commerce*, *supra*, in referring to the failure of the plaintiff to exhaust his remedy within the corporation, we said:

> "The matter would be one pre-eminently for the consideration of the stockholders as a body, and the objection of the plaintiff to the pension fund plan should first have been brought to the attention of that body for redress of any wrong that he claims to have suffered. This is not an emergency suit, and no irreparable injury is threatened. Indeed, the wrong, if any, was committed long prior to the commencement of the suit. * * * It is not shown that attempt was made to bring the matter to the attention of the stockholders at this meeting, and no showing is made why this was not done. The record does not show that any at-

tempt was made to bring about action by the stockholders in regard to the matter, or to call it to their attention. * * * There is no showing that the directors hold or have ever held a controlling, or even a large, interest in the stock of the bank. * * * There is no showing that any of the stockholders were antagonistic to the bringing of such suit, or that the interests of the other stockholders were in any way antagonistic to the interest of the plaintiff."

What is said in *Haffer* v. *Voit*, *supra*, points out the inadequacy of the excuse offered by the plaintiff for not seeking redress through the stockholders. In the course of that opinion it is said:

"* * * plaintiffs made no earnest and honest effort to secure from the stockholders such action as they desired, Cf. Rule 23 (b) Rules of Civil Procedure, 28 U.S.C.A.; *Long* v. *Stites*, 6 Cir., 88 F.2d 554; * * * plaintiffs' explanation that they made no effort to secure such action from the stockholders upon the ground, among others, that they were widely scattered and that there would be expense and delay incident to such demand, is legally insufficient."

What is said in *Stone* v. *Holly Hill Products*, *supra*, is here peculiarly apposite. It is there said, *inter alia*:

"If it had been distinctly alleged that all four of the directors who are joined as defendants were so involved as to make application to them obviously futile, there should have been an effort made through the stockholders to control or supplant them. It is not alleged that there is any wrong combination of a majority of the stockholders, but only that they live at a distance, are ignorant of the situation, and send their proxies to the president. The plain remedy for that would be to seek another stockholders' meeting, after informing the other stockholders of the situation and asking them to withdraw their proxies and to attend. A stockholder, in taking stock in the ordinary

corporation, submits, within the charter limits, to a guidance of the corporate affairs according to the will of the owners of a majority of the stock and through the directors whom the majority choose. The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter at issue."

It is worthy of note that although this derivative action purports to have been brought on behalf of plaintiff and other stockholders, no other stockholders have joined in its prosecution. Rule 23 (a) Federal Rules of Civil Procedure, Title 28, United States Code, authorizing class actions, provides that such an action may he maintained by one of the class "as will fairly insure the adequate representation of all." It is urged that plaintiff in fact has interests adverse to those of the other stockholders of Frisco. Plaintiff is the owner of stock in the Central of Georgia and he admits that another stockholder of Central of Georgia is sharing with him the expenses of both his actions. His adverse interest is further disclosed by his deposition offered in support of defendant's motion to dismiss both actions, wherein he among other things testified as follows:

"Q. Let me ask you this. At the hearing you opposed the Frisco application.

"A. Right.

"Q. Because you wanted Central to remain independent.

"A. Right. * * * I will put it this way, that the upper management of the Central of Georgia, including the Executive Committee and the Chairman, did arrange to further the interests of the Frisco in acquir-

ing the Central of Georgia. * * * Which, in my opinion was inimical to my investment in the Central of Georgia, and the interests of the people I represented. And therefore, taking the Central of Georgia as a whole, its interests would not be advanced by control or merger with the Frisco, which was the ultimate object of the Frisco's acquisition of Central's stock."

Manifestly, it was the opinion of the plaintiff that the purchase of Central of Georgia stock by the Frisco was advantageous to the Frisco and its stockholders but the sale of Central of Georgia stock by that company was detrimental to the company and its stockholders of whom he was one. He had such adverse interests as made him an unfit person to maintain this class action. We conclude that the court committed no error in dismissing plaintiff's stockholder's derivative action.

In his bondholder's suit, plaintiff alleges that he is the owner of certain bonds of the Frisco in the aggregate amount of $17,000.00, and he purports to bring his action on behalf of all bondholders. No other bondholders, however, have joined in the action. His contention is that he and his fellow bondholders were injured by the action of Frisco's directors in using the proceeds of the sale of the bonds to purchase stock of the Central of Georgia Railway Company. In his prayer for relief plaintiff seeks an injunction restraining Frisco from exercising any acts of ownership or control over the Central stock; that the Central stock be seized, impounded, sequestered and turned over to a trustee to be designated by the court; that such trustee be directed to hold the stock for the benefit of all of the bondholders whom plaintiff purports to represent; that he be awarded compensatory damages for a loss caused by diminution in the market value of his securities by reason of the alleged unlawful acts of Frisco and the

individual defendants. He also seeks punitive damages, counsel fees and expenses.

Plaintiff as a bondholder is a contract creditor of Frisco and hence is bound by the provisions of the mortgage indenture under which the bonds were issued. This mortgage indenture secured the bonds of plaintiff and other bondholders similarly situated. This indenture contains certain express requirements of notification, request, and offer of indemnity to the indenture trustees as a condition precedent to the bringing of suit by an individual bondholder. Section 21 of the indenture reads as follows:

> "No holder of any Bond or appurtenant coupon shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this Indenture, or for the execution of any trust hereunder, including the appointment of a Receiver, or for any other remedy hereunder, unless such holder previously shall have delivered to the Trustees written notice that some one or more specified Events of Default has happened and is continuing, nor unless also the holders of twenty-five per cent (25%) in principal amount of the Bonds then outstanding shall have requested the Trustees in writing, and shall have afforded to them reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in their own names, nor unless one or more holders of Bonds shall have offered to the Trustees adequate security and indemnity, satisfactory to them, against the costs, expenses and liabilities to be incurred therein or thereby, nor unless the Trustees shall have refused or neglected to act on such notification, request or offer of indemnity are hereby declared, in every such case, at the option of the Trustees, to be conditions precedent to the execution of the powers and trusts of this Indenture and to any action or cause of action for foreclosure, including the appointment of a Receiver,

or for any other remedy hereunder, it being understood and intended that no holder or holders of Bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted had or maintained in the manner herein provided, and for the equal benefit of all holders of the outstanding Bonds or coupons."

These conditions have not been met by plaintiff and we have held compliance with them a condition precedent to the right of an individual bondholder to maintain an action. These restrictions place positive limitations on the rights of every bondholder which cannot at his option be ignored. They are both reasonable and salutary. *Central State Life Ins. Co.* v. *Koplar Co.*, 8 Cir., 80 F.2d 754; *Allan* v. *Moline Plow Co.*, 8 Cir., 14 F.2d 912; *Home Mortg. Co.* v. *Ramsey*, 4 Cir., 49 F.2d 738; *Muren* v. *Southern Coal & Mining Co.*, Mo., 160 S.W. 835. The reasons for the rule are stated by us in *Central States Life Ins. Co.* v. *Koplar*, *supra*, as follows:

> "The reason for the rule is not far to seek. If in a mortgage securing thousands of bonds every holder of a bond or bonds were free to sue at will for himself and for others similarly situated, the resulting harassment and litigation would be not only burdensome but intolerable."

Plaintiff seeks to sustain his right to maintain the action on the ground that he is not seeking to sue under the indenture but merely "to protect himself against loss or damage." In answer to a similar contention made in *Allan* v. *Moline Plow Co.*, *supra*, this court said:

> "* * * the provisions of the trust agreement prohibited plaintiff from maintaining this suit until de-

mand had been made upon the trustee by at least 25 per cent, in amount of the note holders to prosecute the suit and the trustee had refused so to do. It follows that the very contract upon which plaintiff's cause of action is predicated provides that he shall not maintain this suit until the performance of a condition precedent which has not yet been performed."

The same thought is expressed by the Fourth U. S. Court of Appeals in *Home Mortg. Co.* v. *Ramsey, supra*, wherein it is said:

"Moreover, we think that the plaintiff is precluded from maintaining this suit by the terms of her bonds and the indenture securing them which provide in substance that action can be taken for the protection of the interest of the bondholders only where a certain number of the bondholders join. These provisions have already been quoted. The plaintiff argues that these provisions are void because it is an attempt to oust the jurisdiction of the courts. We do not so regard them. Under the terms of the bonds and indenture, the trustee is the representative of the plaintiff, and entitled to bring suit. The provisions are merely reasonable conditions precedent to the right of the plaintiff to bring the suit herself. They are intended for the security of all the bondholders and no doubt rendered the bonds more salable. They were devised for just such a case as is presented here, where one bondholder, or a small minority, is determined upon action which a large majority believe hostile to their interests. The limitations imposed by the contract have not been met in this case."

We have considered all other contentions urged by plaintiff but think them without merit. The order appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1959.

No. 16310

Edward F. Quirke, Appellant,

vs.

St. Louis-San Francisco Railway Company, Daniel K. Catlin, E. M. Dodds, Benedict K. Goodman, Hugh L. Harrell, Hugh McK. Jones, R. Otis McClintock, David Roberts, Jr., T. H. Banister, E. L. Bruce, Jr., Clark Hungerford, Gale F. Johnston, Richard J. Lockwood, W. A. McDonnell, Frank A. Thompson, Lester E. Cox, B. B. Culver, Jr., Samuel S. Hall, Jr., Barrett S. Heddens, R. J. Stone, Lewis B. Stuart, C. P. Whitehead, L. O. Humphreys, Joseph W. Shands and Fred B. Wilson.

No. 16311

Edward F. Quirke, Appellant,

vs.

St. Louis-San Francisco Railway Company, Daniel K. Catlin, E. M. Dodds, Benedict K. Goodman, Hugh L. Harrell, Hugh McK. Jones, R. Otis McClintock, David Roberts, Jr., T. H. Banister, E. L. Bruce, Jr., Clark Hungerford, Gale F. Johnston, Richard J. Lockwood, W. A. McDonnell, Frank A. Thompson, Lester E. Cox, B. B. Culver, Jr., Samuel S. Hall, Jr., Barrett S. Heddens, R. J. Stone, Lewis B. Stuart, C. P. Whitehead, L. O. Humphreys and Fred B. Wilson.

No. 16312

Edward F. Quirke, Appellant,

vs.

St. Louis-San Francisco Railway Company and David Roberts, Jr.

No. 16313

Edward F. Quirke, Appellant,

vs.

St. Louis.-San Francisco Railway Company and E. L. Bruce, Jr.

No. 16314

Edward F. Quirke, Appellant,

vs.

St. Louis-San Francisco Railway Company, Hugh L. Harrell and R. Otis McClintock.

Appeals from the United States District Court for the Eastern District of Missouri.

These Causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in these causes (Nos. 58C 157 (2), 58C 158 (2), 58C 367(2), 58C 371(2), and 58C 373(2) in the District Court) be, and the same is hereby, affirmed.

May 4, 1960.

(Order Staying Issuance of Mandate.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1959.

Edward F. Quirke, Appellant, vs. St. Louis-San Francisco Railway Company et al.	Nos. 16310 to 16314, incl.

Appeals from the United States District Court for the Eastern District of Missouri.

On Consideration of the motion of the appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

May 24, 1960.

Rules of Civil Procedure, Rule 23 (b).

"(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refused to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share there after devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."